

No. 49156-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TIMBERLAND BANK, a
Washington corporation,

Respondent,

vs.

SHAWN A. MESAROS,

Appellant.

BRIEF OF RESPONDENT

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INTRODUCTION

Appellant Shawn Mesaros (hereinafter “Mesaros”) cannot establish that the trial court abused its discretion in denying his request for a trial on the issue of his claim for an upset price. His request was based only on his claim that the price realized at the Sheriff’s Sale of the real property subject to this case (hereinafter “the Real Property”) was too low. He alleged no procedural defect and raised no evidence explaining a lack of competitive bidding at the sale. His request was met with objective evidence of value of the Real Property submitted by Respondent Timberland Bank (hereinafter “Timberland”). This evidence included a realtor’s price opinion, an appraiser’s appraisal, lack of interest from members of the public, failure of Mesaros to redeem the property, and the actions of Mesaros before and after the sale.

The trial court would have been within its discretion even if Mesaros had offered anything more than his own self-serving declaration. Certainly the trial court’s decision was not untenable in the absence of any objective offer of proof by Mesaros. This Court should affirm.

RESTATEMENT OF ISSUES

- a. This court should not consider the argument for a void sale when it was not raised at the trial court level. In his opening brief, Mesaros now argues for

the first time that the Sheriff's Sale was void. This court should refuse to consider this issue pursuant to RAP 2.5(a).

- b. This court should not consider the new arguments regarding the allegation of procedural defects in the sheriff's sale process. The record is devoid of any support for these arguments because they were not raised in the trial court. The court should refuse to consider these arguments pursuant to RAP 2.5(a).
- c. This court should not overrule the discretionary ruling of the trial court confirming the sale and denying the request for an upset price hearing. The trial court did not abuse its discretion and correctly applied the facts to the law.

RESTATEMENT OF CASE

a. Valuation of the Real Property

Prior to and at the date of the court's entry of the order confirming sale, the trial court had the following evidence of value before it:

1. A Comparative Market Analysis ("CMA") prepared by a local realtor on April 6, 2016. CP 92-96.
2. An appraisal prepared by a Certified General Appraiser on June 9, 2016 giving a value as of May 25, 2016. CP 97-116.
3. A sworn declaration from a local realtor stating that in April and May of 2016 there was no purchaser interest in the Real Property at a price of \$184,000. CP 117-118.
4. Appellant's rejection of Respondent's proposal for him to retain ownership of the Real Property and forgiveness of the judgment against him for \$350,000. CP 83.
5. The Defendant's allegation of appraisals from 2007 and 2008. CP 65-66.

6. The Defendant's citing to the Grays Harbor County Assessor's value for the Real Property. CP 66.

The CMA provided a range for the value of the Real Property from \$150,000 to \$200,000. CP 93. The appraisal submitted to the trial court set the fair market value of the Real Property at \$220,000. CP 97. The local realtor's opinion and marketing of the property put a maximum value of the property under \$184,000. CP 118.

Timberland offered Mesaros a full satisfaction of the judgment in excess of \$364,000 plus additional interest, costs, and expenses and 100% ownership of the Real Property if he would pay under \$350,000 on his debt. CP 88. Mesaros did not accept this offer. CP 83.

Without any supporting documentation, Mesaros's recollection of the old appraisals was that the "upper range" of an appraisal from 2007 was one million dollars and \$450,000. CP 65-66. Respondent disputes that these appraisals at the stated levels ever occurred. CP 91.

Mesaros may redeem the property until May 27, 2017. CP 35. Mr. Mesaros has the absolute right to purchase the Real Property back at the price of the bid amount plus interest. RCW 6.23.020(2). He has not done so.

b. The Sheriff's Sale of the Real Property

Mesaros had advance knowledge of the sheriff's sale dates and procedures. CP_83. He knew the original sale date and the opening bid ranges. *Id.* He understood the mechanics of the sale and the prospects of a substantial deficiency judgment. *Id.* He was informed that the sale was going to be postponed approximately one month so that Timberland could commission a formal appraisal in response to his initial objections regarding value. CP 90.

Through counsel, Timberland took unusual steps to publicize the sheriff's sale and circulated opening bid amounts to local realtors to generate interest. CP 117-118. No interest was found for purchasing the Real Property at the identified opening bid amount. *Id.* Mesaros was urged to do publicize the sale and seek out investors interested in purchasing the Real Property. CP 87.

The sale was originally scheduled for April 29, 2016. CP 41. The sale was postponed to May 27, 2016 as authorized by court order. CP 30-31. The opening bid offered by Timberland was \$202,400. CP 91. This amount was more than what was to be the opening bid at the original sale date. CP 90. And the bid amount was calculated by taking the highest amount in the range and deducting costs of eventual re-sale. CP 91.

Timberland was the highest bidder at the sale at the opening bid amount. CP 33.

c. Order Confirming Sale and Denying Upset Price Hearing Request

After the Grays Harbor County Sheriff scheduled the hearing for the Order Confirming Sale, Mesaros objected to the confirmation and requested an upset price hearing “because the sale price procured at the foreclosure sale is far below the fair value of the property.” CP 55. Mesaros did not raise any other factual basis for his objection to confirmation. The entirety of his objection to confirmation of sale and request for an upset price was that the Real Property was worth more than what was obtained at the sheriff’s sale. CP 55-62. He did not mention or allege any procedural irregularities with the sale or claim the sale was void in any way. *Id.*

The court at the hearing found that Mesaros had not made a *prima facie* showing regarding his request for an upset price, and so the request for an upset price hearing was denied. CP 119-121; RP 7-8. After Mesaros filed his Notice of Appeal, upon direction from the clerk of this court for additional findings, the trial court entered its Order Denying Defendant’s Motion for Upset Price. CP 241-245. This order contains the specific finding that the court did not consider any arguments regarding

procedural defects with the sale as none of these arguments were raised in any court filing. CP 244. The order also specified that the appraisal submitted after the Order Confirming Sale was entered lacked any evidentiary value regarding the value of the Real Property. CP 244. Mesaros did not appeal this order.

ARGUMENT

A. Scope of Review

The Rules of Appellate Procedure state that this court may “refuse to review any claim of error not raised in the trial court.” RAP 2.5(a). “As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time.” *Washington Fed. Sav. v. Klein*, 117 Wn. App. 22, 29, 311 P.3d 53, 56 (2013). The purpose of the rule is to encourage the efficient use of judicial resources. *State v. Lindsey*, 117 Wn. App. 233, 247, 311 P.3d 61, 69 (2013). The rule has specific exceptions, which are set forth in RAP 2.5(a). None of which are applicable to this case.

Here, appellant raises issues that were not considered by the trial court. BA 2 (Issues 3-5). The trial court found specifically that the statements made by counsel for appellant about procedural irregularities were not considered by the trial court. CP 244. Thus, the new allegations of procedural defects and the argument that the Sheriff’s Sale is somehow

void were never raised in the trial court. RAP 2.5(a) and the purpose underlying the rule compel this court to remove these issues from the scope of its review.

In addition, appellant now seeks to appeal the trial court's Order Denying Motion for Upset Price set forth in the Clerk's Papers at pages 241-245. BA 2-3 (Issue No. 6). No Notice of Appeal was filed by appellant regarding this order. A separate Notice of Appeal is required if appellant seeks to review this order. RAP 5.1(f).

The argument that the trial court went beyond its authority when entering the Order Denying Motion for Upset Price was never raised in the trial court. Mesaros's objections to the proposed order are silent on this issue. CP 129-132. And Mesaros did not object in this court to the entry of this order pursuant as required by RAP 9.13.

However, even if this court accepts review of the Order Denying Motion for Upset Price and even if Mesaros had not failed to preserve the issue he now raises, the trial court was well within its authority to enter the order. The trial court, after direction from the clerk of this court regarding the entry of findings, set forth its bases for denying Mesaros's motion. The order did not "change a decision then being reviewed in the appellate court" as RAP 7.2(3) contemplates. The terms of the Order Confirming Sale were not changed in any way.

The actions of the trial court here are in stark contrast to the case cited by Mesaros on this issue. Mesaros cites *State v. Pruitt*, 145 Wn. App. 784, 187 P.3d 326 (2008). In *Pruitt*, the defendant/appellant was convicted in a second trial while an appeal of a first trial was taken. *Pruitt* at 794. The second trial convicted Pruitt of the same offense but on an alternate factual basis of guilt. *Pruitt* at 791. Here, no additional facts were presented to the court and the findings of the court are supported by the declarations filed by Timberland prior to the hearing on the Order Confirming Sale set forth in Clerk's Papers 81-118.

The heretofore unchallenged Order Denying Motion for Upset Price memorialized and explained the trial court's decision.

Where record on appeal is silent as to whether exceptions to instructions were called to court's attention, it is within power of trial court, by supplemental certificate, to certify that exceptions were called to its attention at proper time.

Yarno v. Hedlund Box & Lumber Co., 129 Wash. 457, 225 P. 659 (1924).

This court should limit the scope of its review accordingly and only review the issues raised in the trial court and properly-preserved on appeal. Therefore, the issues regarding procedural defects surrounding the Sheriff's Sale, the allegation of a void Sheriff's Sale, and the review of the Order Denying Motion for Upset Price should not be considered.

B. Standard of Review

RCW 61.12.060 provides, in pertinent part:

The court, in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale.

The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing, establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment.

The statute is permissive, and appellate courts review decisions of trial courts regarding upset price applications under an abuse of discretion standard. Obviously, the statute contemplates a trial court refusing to conduct an upset price hearing under certain circumstances. The decision to deny Mesaros's request for an upset price hearing was discretionary.

This court will not reverse a discretionary ruling unless it is plainly apparent that the trial court abused its discretion. *Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58 (1999). An abuse of discretion occurs if a trial court's decision is based on indefensible grounds or reasons. *Stevens* at 29. A decision upon which reasonable minds could differ requires affirmation from an appellate court. *Id.*

The court's decision in this case was based upon the evidence of value provided to the court before the entry of the Order Confirming Sale. Timberland presented objective evidence of value including a

contemporaneous appraisal, a contemporaneous Comparative Market Analysis, the opinion of a local realtor, and that same realtor's unsuccessful efforts to generate interest at a price level below the successful bid. CP 92-118. Also, the court was informed of Mesaros's rejection of an offer to re-acquire the Real Property at a price below his stated opinion of its value. And the court was informed of the redemption period and process that Mesaros could utilize if the Real Property was valued even close to what he claimed. CP 83, RP 8.

Mesaros offered his own, self-serving opinion as to the Real Property's value. CP 64-67. His opinion was based on alleged appraisals from ten years prior to the Sheriff's Sale, county assessed value, and a comparison to one recent sale. *Id.* Timberland denied the existence of the old appraisals at the values Mesaros claimed. CP 91. Old appraisals (even if they existed at the disputed values alleged by Mesaros) were appropriately rejected by the trial court's analysis of fair value at the time of the sale. Assessed value has repeatedly been rejected by courts as a basis for fair market value. *Am. State Bank v. Butts*, 111 Wash. 612, 614, 191 P. 754, 754 (1920) (citing numerous cases from various states rejecting the use of assessed value).

In addition, Mesaros had (and still has) redemption rights in the property. Pursuant to RCW 6.23.020(2), Mesaros may redeem the

property by paying the amount of the bid plus interest. His failure to do so speaks much louder than his unsupported allegation of the Real Property's value.

Thus, the question for this court is whether it was "untenable" for the trial court to accept contemporaneous appraisals and the failure of the Real Property to sell for an amount less than the prevailing bid over the self-serving statement of Mesaros that the Real Property had significant value.

C. The Discretionary Ruling Should be Affirmed

Mesaros identifies two sets of circumstances allowing an upset price to be set by the court. BA 12. First, where a prevailing bid is so low as to "shock the conscience." *Miebach v. Colasurdo*, 120 Wn.2d 170, 177-178, 685 P.2d 1074 (1984). In fact, *Miebach* was the result of an equitable action to set aside an execution sale, rather than an upset price hearing case. But, in any event, there is nothing in the record that the prevailing bid here was shocking to the conscience.

Second, when the prevailing bid does not reflect fair value and there was no competitive bidding at the sale, an upset price may be set. *Lee v. Barnes*, 61 Wn.2d 581, 585-86, 379 P.2d 362 (1963). *Lee* discusses the issue of competitive bidding and concludes that if there is a very low sale price and unusual reasons for a lack of competitive bidding,

it is unlikely that fair value is yielded at the sale. *Id.* Therefore, if the trial court's ruling that the Sheriff's Sale price was consistent with the value of the Real Property was tenable, the decision must be affirmed. Or, if the trial court's finding of no reason for a lack of competitive bidding at the sale was tenable, the decision must be affirmed. Mesaros has the burden of demonstrating that the trial court's decision on both of these issues was untenable. He cannot meet this burden as the evidence of value was supported by multiple, credible, objective sources. And so, it was wholly reasonable for the trial court to accept these values in its ruling.

Even if Mesaros had been successful in demonstrating that the sale price was "grossly inadequate," he cannot meet his burden with respect to the court's findings that there was no demonstrated reason for lack of competitive bidding at the sale. CP 243. The sole reference to a lack of competitive bidding at the sale was made in a declaration signed by Mesaros at CP 66-67. There, Mesaros claimed that he was not aware of any publicity conducted by Timberland prior to the sale. CP 66. This assumption made by Mesaros was directly refuted by the Declaration of Jelovich. CP 117-118. That declaration shows Timberland, because it had no desire to own the Real Property, took steps beyond the required statutory minima to avoid owning the property. The fact that there was no interest at the opening bid amount does not imply a lack of competitive

bidding. It only shows that no party was interested in purchasing the Real Property for such a high price.

Mesaros cites *American Fed. Sav. & Loan Ass'n. of Tacoma v. McCaffrey*, 107 Wn.2d 181, 728 P.2d 155 (1986) as his authority for a proper analysis by a trial court at an upset price hearing. BA 14. However, *McCaffrey* supports Timberland's position and ratifies the trial court's decision. In *McCaffrey*, the party challenging the sheriff's sale price produced an appraisal showing a value in excess of the highest bid at the sale. *McCaffrey* at 188. In addition to the appraisal, McCaffrey offered evidence of "the McCaffreys presented evidence that economic conditions at the time of the sale as well as the uniqueness of the (property) contributed to a lack of competitive bidding." *Id.* In contrast to the approach taken by the McCaffreys, Mesaros offered no appraisal and no evidence of economic conditions or uniqueness of the property. He only offered his own opinion and references to assessed values. CP 64-67.

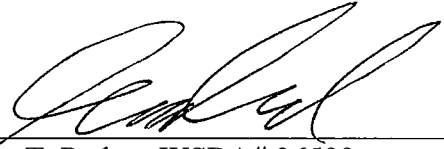
The court was within its discretion to decline to set an upset price hearing. A court can reject proffered evidence lacking credibility in declining to set an upset price. *McClure v. Delguzzi*, 53 Wn.App. 404, 407, 767 P.2d 146, 148 (1989).

Mesaros failed to make a *prima facie* case regarding an upset price, and the trial court was within its discretion in denying Mesaros's request

for an evidentiary hearing. The discretionary ruling by the trial court should be affirmed.

Respectfully submitted this 30th day of March 2017.

PARKER, WINKELMAN & PARKER, P.S.

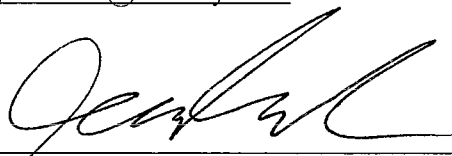
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Certificate of Service

I certify that on March 30 2017, I caused a true and correct copy of the foregoing Brief of Respondent to be served on the following in the manner indicated below:

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